No. 82-2056

In The
Supreme Court of the United States
October Term, 1983

ESCONDIDO MUTUAL WATER CO., et al.,
Petitioners,

vs.

LA JOLLA BAND OF MISSION INDIANS, FEDERAL ENERGY REGULATORY COMMISSION, SECRETARY OF THE INTERIOR, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS LA JOLLA, RINCON, SAN PASQUAL, PAUMA AND PALA BANDS OF MISSION INDIANS

Arthur J. Gajarsa
Counsel of Record
Wender, Murase & White
One Lafayette Centre
1120 Twentieth Street, N.W.
Washington, D.C. 20036
(202) 452-8950

Attorneys for San Pasqual Band of Mission Indians

Robert S. Pelcyger
Counsel of Record
Scott B. McElroy
Fredericks & Pelcyger
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 443-1683

Jeanne S. Whiteing
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Attorneys for La Jolla, Rincon, Pauma, and Pala Bands of Mission Indians

COCKLE PRINTING CO., 2111 Douglas St., Omaha 68102

QUESTIONS PRESENTED

1. Whether, as part of a new license for a project whose primary and essential purpose is the conveyance of water, the Federal Energy Regulatory Commission is authorized to grant rights of way for water conveyance facilities without the consent of the affected Indian Bands across three Indian Reservations established pursuant to the Mission Indian Relief Act of 1891, 26 Stat. 712.

2. Whether pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), a license issued by the Federal Energy Regulatory Commission must be subject to and contain the conditions that the Secretary of the Interior deems necessary for the adequate protection and utilization of Indian Reservations.

3. Whether Indian water rights are reservations within the meaning of Section 3(2) of the Federal Power Act, 16 U.S.C. § 796(2), and qualify for the protection afforded reservations by Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e).

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STATEMENT OF THE CASE

The license for Project No. 176 was issued to the Escondido Mutual Water Company in 1924 for a fifty year term. The license authorized, *inter alia*, the use of the lands of the La Jolla, Ricon, and San Pasqual Indian Reservation for water conveyance facilities. Since 1974, the project has continued to operate pursuant to annual licenses issued pursuant to Section 15(a) of the Federal Power Act (FPA), 16 U.S.C. § 808(a). Pet. App. 2, 5.

The primary and essential purposes of the project is the conveyance of water from the San Luis Rey River to

Lake Wohlford. Power production is incidental. Pet. App. 338. The amount of power generated by the project is *"de minimus,"* "not even the equivalent to that produced by half a dozen modern automobiles." Pet. App. 13-14. The diversion and conveyance of the waters of the San Luis Rey River adversely affects the water supply of six downstream Indian reservations that were established pursuant to the Mission Indian Relief Act (MIRA) of 1891, 26 Stat. 712. Pet. App. 4-5, 9, 23.

The respective water rights of the Indian Reservations and the petitioners are the subject of separate litigation pending before the United States District Court for the Southern District of California. Pet. App. 7. All parties agree that the Federal Energy Regulatory Commission (hereinafter "Commission") lacks jurisdiction to adjudicate those rights. Pet. App. 99, 364. Owing to the obvious and close relationship between the license for Project No. 176 and the pending water rights adjudication suit, the Commission imposed a condition in the new license to the petitioners that reserved authority in the Commission "to modify this license in any manner considered appropriate in the light of the final disposition of that litigation." Pet. App. 10, 105-08, 259, 362. The areas currently being served with water from Project No. 176 have an available alternative supply. Pet. App. 124-27.

Throughout the lengthy relicensing proceedings before the Commission, *see* Pet. App. 72-73, the Secretary of the Interior recognized the importance of his power to impose conditions to insure the adequate protection and utilization of Indian Reservations under FPA Section 4(e), 16 U. S. C. § 797(e). The Secretary was careful to insure that

all parties would have ample opportunity to be heard, to oppose, or to suggest modifications in those conditions.

Initially, when the tentative conditions were submitted, the Secretary expressly stated that they were subject to modification based on the administrative record as it developed. JA 2663.[1] Subsequently, all of the parties, including the petitioners and the Commission Staff, were provided an opportunity to comment on the conditions. JA 1710-51. Then three high-ranking Interior Department officials, including the Solicitor of the Department and the Commissioner of Indian Affairs, appeared before the Administrative Law Judge and engaged in a dialogue concerning the Secretary's conditions with all parties, including the Commission Staff. JA 1771-1908a. At that time, the Secretary's representatives agreed to modify certain conditions and to reexamine others. JA 1784, 1789-92, 1876-83. The Secretary subsequently submitted his final revised conditions which included detailed explanations of the law and facts on which they were based as well as responses to the questions and concerns that had been raised by the parties and the Commission Staff. JA 2664, 2681.[2]

No one challenged the Secretary's conditions on the grounds that they are not necessary for the adequate protection and utilization of the Indian Reservations or that they are unreasonable, arbitrary, or capricious *when judged*

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[1]"JA" refers to the eleven volume Joint Appendix that was filed with the Court of Appeals.

[2]By contrast, the conditions that the Commission substituted for the Secretary's made their first appearance when the Commission issued its decision in 1979, long after the close of evidence.

by that standard. The Commission and the petitioners did contend that the conditions should not be included in the license because they are contrary to their conceptions of the public interest or because they are inconsistent with the petitioners' plans for operating the project. *See, e.g.,* Pet. App. 18, 143, 147, 150-51.

The Court of Appeals held that the conditions which the Secretary "deems necessary for the adequate protection and utilization" of the reservations must be included in the license issued by the Commission. It also expressly held that the Secretary's conditions must be reasonable and that their reasonableness is subject to review in the Court of Appeals pursuant to FPA § 313(b), 16 U. S. C. § 825*l*(b). Pet. App. 24-25, *modified,* Pet. App. 32-33. *See also,* Pet. App. 39-40 (dissenting opinion).

ARGUMENT

Introduction and Summary

The decision below does not warrant review. There is no conflict in the circuits. Two of the three questions on which the petitioners seek review are limited to the unique facts and circumstances of this case. The third issue, the effect of the conditions that the Secretary of the Interior deems necessary for the adequate protection and utilization of reservations, is governed by the explicit language of the statute from which there is no reason to depart. Contrary to the petitioners' contentions, the decision below does not conflict with any decision of this Court

and, what is more, it is entirely consistent with three other federal appellate decisions.

Furthermore, the Ninth Circuit's decision is interlocutory; the case was remanded back to the Commission for further proceedings. In addition, it is only one part of a larger controversy between the parties. The complex issues involving their respective water rights, which the Commission recognized ultimately could have a crucial bearing on its license, are still pending before the federal district court. Under the Ninth Circuit's judgment, the Commission and the District Court now will be able to coordinate the resolution of the interrelated issues that are committed to their respective jurisdictions. In this double interlocutory posture, review by this Court at this time plainly would be premature.

I. The Court of Appeals' Decision Gives Effect to the Express Terms of the Federal Power Act and the Mission Indian Relief Act.

The reservation proviso to Section 4(e) of the Federal Power Act, 16 U. S. C. § 797(e), is fundamental to all three holdings of the Court of Appeals that are challenged by the petitioners. The proviso qualifies the Commission's authority to issue hydroelectric licenses involving federal reservations by stating:

> That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose, for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

The Court of Appeals held that this unambiguous language means what it so plainly says; the Commission's licenses "shall be subject to and contain" the Secretary's conditions. Pet. App. 22-25. It rejected the petitioners' argument that the Secretaries' powers under the reservation proviso should be subordinated to the Commission's responsibilities under FPA Section 10(a), 16 U.S.C. § 803(a). Any other result would be contrary to all of the applicable canons of construction: that effect must be given to all provisions of a statute if at all possible, *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973); that a general provision will not control or nullify a matter that is specifically dealt with in another part of the statute, *McEvoy v. United States*, 322 U.S. 102, 107 (1944); and that courts should not adopt an interpretation that would render any provision of a statute superfluous, *Andrus v. Glover Construction Co.*, 446 U.S. 608, 618 n.19 (1980); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). The Court of Appeals' holding is further buttressed by FPA Section 10(g), 16 U.S.C. § 803(g), which subjects licenses to "such other conditions not inconsistent with the provisions of this Act as the Commission may require." Thus, the Commission's conditions cannot supercede the powers vested in the Secretaries under Section 4(e).

The Court of Appeals also held that Indian water rights are subject to the protection afforded by the reservation proviso. They are clearly encompassed within the definition of "reservations" set forth in FPA Section 3(2), 16 U.S.C. § 796(2), "interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws,"

or "interests in lands acquired and held for any public purposes." Pet. App. 25-26, 380.[3]

No one—neither the petitioners, the amicus curiae, nor the Court of Appeals' dissenter—offers any construction of the actual words of FPA Sections 4(e) and 3(2) that could possibly lead to any other conclusions.

The third issue raised by the petitioners involves the relationship between the Federal Power Act and the Mission Indian Relief Act (MIRA). Section 8 of MIRA, Pet. App. 16-17, 379-80, provides that private parties can obtain rights of way for water conveyance facilities across MIRA Reservations by entering into a contract with the Indian owners (tribal or individual) which must be approved by the Secretary of the Interior. Pet. App. 16-20[4] The Court of Appeals held that the specific procedure set

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[3]FPA Section 23(b), 16 U.S.C. § 817, provides additional support for the lower court's holding that Indian water rights are subject to the protection afforded by the reservation proviso. In defining the scope of the Commission's jurisdiction, Section 23(b) exempts projects on non-navigable waters that would not affect the interests of interstate or foreign commerce only "if no public lands or reservations are affected." Thus, Section 23(b) shows that Congress did not intend to limit the scope of the reservation proviso to projects physically located within reservations.

[4]Petitioners point out that Section 8 provides that any citizen, firm, or corporation "may contract" with the Indian Bands for the right to construct ditches or canals across tribal lands and suggest that this phraseology is significant. Pet. 7 n. 13. In context, however, the use of the permissive verb "may" rather than the mandatory "shall" obviously means that it is up to the Bands to decide whether to exercise the authority vested in them by Section 8. *See* Creek Nation v. United States, 318 U. S. 629, 639 (1943); United States v. Reeb, 433 F. 2d 381, 383 (9th Cir. 1970).

forth in Section 8 governs the acquisition of the canal rights of way sought by the petitioners for their water diversion project.

In response to the contention that Section 8 has been nullified by FPA Section 29, 16 U. S. C. § 823, which repeals "[a]ll Acts or parts of Acts inconsistent" with the FPA, the Court held that the two laws are not inconsistent because the reservation proviso to Section 4(e) manifests Congress' intent to preserve preexisting Indian rights. Pet. App. 21. The same result was reached in *Lac Courte Oreilles Band v. FPC,* 510 F. 2d 198, 210-12 (D. C. Cir. 1975). Petitioners cannot and do not explain how a statute that expressly prevents any interference with the purposes of Indian reservations can somehow result in the abrogation of rights and powers that Congress deemed necessary for their protection.

Moreover, this is not a suitable case for determining whether any pre-1920 statutes that define or vest powers in Indian tribes are repealed by FPA Section 29. As noted *supra* at 1-2, the primary purpose of Project No. 176 is the diversion and conveyance of water; power is clearly an incidental and secondary function. Section 8 of MIRA is the specific statute that governs the acquisition of rights of way for water conveyance facilities across Mission Indian Reservations. The principal purpose of the Federal Power Act, by contrast, is "licensing the construction, operation and maintenance of facilities for the development of [hydro]electric power. . . ." Pet. App. 338. *See also,* Pet. App. 145; *Chemehuevi Tribe of Indians v. FPC,* 420 U. S. 395, 405 (1975) (FPA's underlying purpose is "the comprehensive development of water power.") Accord-

ingly, the issuance of canal rights of way would be governed by MIRA Section 8, because its provisions are more closely associated with the specific substance of this particular controversy, even if FPA Section 29 repeals "inconsistent," pre-1920 Indian statutes insofar as they may apply to projects whose primary and essential purpose is the development of hydroelectric power. *Radzanower v. Touche, Ross & Co.*, 426 U. S. 148, 153 (1976); *Morton v. Mancari*, 417 U. S. 535, 550-51 (1974); *Bowman v. Texas Educational Foundation*, 454 F. 2d 1097, 1101 (5th Cir. 1972). The result reached by the Court of Appeals, applying Section 8 of MIRA to the use of the Indian lands for water conveyance facilities (*see* Pet. App. 132), while requiring a Commission license for the generation of hydroelectric power, Pet. App. 21, is also supported by the rule that the Court will construe two statutes in a manner that gives effect to both while preserving their sense and purpose. *Watt v. Alaska*, 451 U. S. 259, 266-67 (1981).

The Court of Appeals' application of the unambiguous provisions of MIRA and the FPA to the peculiar facts of this case is clear and straightforward. It is only by ignoring the reservation proviso that any other result can be reached.

II. There are No Legal Issues that Warrant Review.

The Petition for Certiorari claims that the decision below merits review because: (i) it sanctions divided authority over hydroelectric licensing rather than subjecting all such matters exclusively to the Commission; (ii) it conflicts with several decisions of this Court; and (iii) it is

inconsistent with prior administrative construction.[5] All of these allegations are plainly mistaken.

A. Divided Authority.

The petitioners' contention that Congress intended the Commission "to be the single agency responsible for administering national water power development" (Pet. 15) is refuted by an examination of the express terms of the Federal Power Act. In addition to the reservation proviso to Section 4(e), 16 U. S. C. § 797(e), several other provisions of the Act explicitly vest authority over various aspects of the licensing process in other federal officials.

For example, immediately following the reservation proviso, Section 4(e) states:

> *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army.

Pet. App. 381. Similarly, FPA Section 11(a), 16 U. S. C. § 804(a), authorizes the Commission to require licensees to construct improvements for navigation purposes "in

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[5]The petitioners also claim that the reservation proviso does not apply to new licenses, Pet. 17, although that issue is not listed in the "Questions Presented for Review." Consideration of that issue is foreclosed because it was not raised by the petitioners in their Petition for Rehearing to the Commission. FPA § 313, 16 U.S.C. § 825 *l*; Greene County Planning Bd. v. FPC, 528 F. 2d 38, 45-46 (2nd Cir. 1975). In any event, FPA Section 15(a), 16 U.S.C. § 808(a), authorizes the Commission to issue new licenses "upon such terms and conditions as may be authorized or required under the then existing laws and regulations," and the reservation proviso to Section 4(e) is plainly an "existing law." Lac Courte Oreilles Band v. FPC, 510 F. 2d 198, 205 n. 22 (D. C. Cir. 1975).

accordance with plans and specifications approved by the Chief of Engineers and the Secretary of the Army." FPA Section 18, 16 U. S. C. § 811, provides that the licensee's operation of any navigable facilities "shall at all times be controlled by such reasonable rules and regulations in the interest of navigation . . . as may be made from time to time by the Secretary of the Army." Section 18 also directs the Commission to require:

> the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of Commerce.

And FPA Section 26, 16 U. S. C. § 820, authorizes either the Commission or the Secretary of the Army to request the Attorney General to initiate litigation for the purpose of revoking a license for violation of its terms.

More recent laws reflect the same policy, A 1978 amendment to the Federal Power Act authorizes the Commission to exempt certain hydrolectric facilities from its licensing jurisdiction. But the Commission is required to:

> include in any such exemption such terms and conditions as the Fish and Wildlife Service and the State [Fish and Game] agency each determine are appropriate to prevent loss of, or damage to, such [fish and wildlife] resources and to otherwise carry out the purposes of [the Fish and Wildlife Coordination] Act [16 U. S. C. §§ 661 *et seq.*]. . . .

FPA § 30(c), 16 U. S. C. 823a(c). Similiarly, a 1980 statute expands the Commission's authority to grant exemptions subject to "the same limitations (to ensure protection for fish and wildlife as well as other environmental

concerns) as those which are set forth in Subsections (c) and (d) of Section 30 of the Federal Power Act [16 U. S. C. § 823a(c) and (d)]. . . ." 16 U. S. C. § 2705.

Thus, viewed in the context of the entire statute, the explicit delegation of authority over Indian, military and other reservations to the Secretaries of Interior, Agriculture, Army, Navy and Air Force contained in the reservation proviso to Section 4(e) is not an aberration. Rather, the Act as a whole plainly reveals Congress' intent to vest authority in the Commission to "*coordinate*" all aspects of hydroelectric licensing, *see* Pet. 15, while at the same time preserving the powers of other federal agencies over matters within their particular domain and expertise.[6] This system apparently has worked well since the Federal Power

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[6]The legislative history of Section 4(e) confirms its plain meaning. The reservation proviso was included in the original draft of the legislation that was sent to the Congress by the Secretaries of Agriculture, War and Interior. *See* Chemehuevi Tribe of Indians v. FPC, 489 F. 2d 1207, 1220 (D. C. Cir. 1973), *reversed on other grounds*, 420 U. S. 395 (1975). O. C. Merrill, the first Secretary of the Commission and one of the FPA's primary draftsmen, *see* United States v. Public Utilities Commission, 345 U. S. 295, 305 n. 10 (1953), wrote a memorandum explaining the provisions of the bill. With respect to what is now FPA Section 4(e), he wrote:

> 4. Licenses for power sites within the National Forests to be subject to such provisions for the protection of the Forests as the Secretary of Agriculture may deem necessary. Similarly for parks and other reservations under the control of the Departments of the Interior and of War. Plans of structures involving navigable streams to be subject to the approval of the Secretary of War.
>
> *This provision is for the purpose of preserving the administrative responsibility of each of the three Departments over lands and other matters within their exclusive jurisdiction.*

JA 4020 (emphasis added).

Act was enacted in 1920. Prior to the 1979 decision in this case and the 1975 decision in *Pacific Gas & Electric Co.*, 53 FPC 523,[7] any differences between the Commission and these agencies were reconciled through administrative processes, and the Commission had never refused to recognize the powers that are so clearly vested in others under the express terms of its governing statute. *See infra* at 17-21.

B. Alleged Conflicts.

Petitioners allege several conflicts with this Court's decisions. Pet. 11-13, 16-17. These conflicts are imaginary.

First Iowa Hydro-Electric Cooperative v. FPC, 328 U. S. 152 (1946), and *FPC v. Oregon*, 349 U. S. 435 (1955), involved the respective powers of the Commission and the states. But "[t]ribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to impart to one notions of preemption that are properly applied to the other." *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136, 143 (1980).

In addition, neither *First Iowa* nor *FPC v. Oregon* construed the reservation proviso to Section 4(e), the authority of the Secretaries of the Interior, Agriculture, Army, Navy and Air Force over affected reservations, or

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[7] In *Pacific Gas & Electric*, unlike this case, the Secretary of Agriculture had not been a party to the Commission's proceedings and Agriculture's conditions were not supported by the evidence of record. *See infra* at 20 n. 13.

any laws applicable to Indians.[8] It is particularly inappropriate to equate or analogize the powers and responsibilities of federal officials, tribes and states when their respective roles are governed by entirely dissimilar statutory provisions. *Compare* FPA Sections 4(e), 9(b), 10(e) and 27, 16 U. S. C. §§ 797(e), 802(b), 803(e), and 821. Indeed, *First Iowa* expressly contrasts the limited role of the States under the statute with "the 'comprehensive' planning which the Act provides shall depend upon the judgment of the . . . Commission *or other representatives of the Federal Government*" citing, *inter alia,* FPA § 4(e). 328 U. S. at 164 & n. 9, emphasis added. *See also,* 328 U. S. at 167-68.

Further, there is a very significant practical difference between tribes and states. Every project licensed by the Commission involves a potential conflict with a state, while there are only a handful of licensed water power projects that utilize Indian lands. *See infra* at 21-23. While it is feasible for Congress to reserve to itself final authority over potential projects which provoke irreconcilable differences between the Commission, the Secretaries and affected tribes, it would defeat the very purpose of the Federal Power Act for Congress to be the final arbiter of all licensing disputes between the Commission and the States. *See United States ex rel. Chapman v. FPC,* 345 U. S. 153, 167-68 (1953).[9]

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[8]The project at issue in FPC v. Oregon was partially located on Indian lands, but no Indian issues were raised because "the Indians [gave] their consent" to the use of their lands. 349 U. S. at 444.

[9]FPC v. Idaho Power Company, 344 U. S. 17 (1952), also cited by the petitioners as conflicting with the decision be-

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Petitioners' reliance on *FPC v. Tuscarora Indian Nation*, 362 U. S. 99 (1960), is also misplaced. The holding of that case was that Tuscarora Indian fee lands were not subject to the protection of the Section 4(e) reservation proviso. They were not owned by the United States in trust for the Tribe and therefore were not encompassed within the FPA's definition of "reservations" in Section 3(2), 16 U. S. C. § 796(2). 362 U. S. at 115.[10] Consequently, *Tuscarora* did not construe the scope of the reservation proviso. And the Court's opinion repeatedly emphasized that the taking of the Tuscarora's fee land for the Niagara Falls hydroelectric project did not violate any right granted to the Tribe by treaty or statute. 362 U. S. at 106 n. 10, 121 n. 18, 123, 124. Three circuit court decisions have held that the Federal Power Act, as construed in *Tuscarora*, does not sanction the taking of Indian lands that are protected by treaty or statute. *United States v. Truckee-*

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low, Pet. 17, involved the validity of a condition imposed on a license by the Commission pursuant to FPA Section 10(g), 16 U. S. C. § 803(g). It had nothing to do with any Indian or other federal reservations or with the authority of any other federal officials. Nor did it construe or even mention the reservation proviso. Contrary to petitioners' unsupported charge, the Court of Appeals is no more of a factfinder when it reviews the reasonableness of the Secretary's Section 4(e) conditions than when it performs the same function in response to an attack on Commission's Section 10(g) conditions. *See infra* at 24-26.

[10]In this case, by contrast, both the reservation lands and water rights are "owned by the United States" within the meaning of Section 3(2). Pet. App. 4, 26. Contrary to the petitioners' confusing misstatements (Pet. 19-20), the holding of the Court of Appeals that Indian water rights constitute "reservations" as defined in that section is entirely consistent with the exclusion of the fee lands owned by the Tuscaroras.

Carson Irrigation District, 649 F. 2d 1286, 1298 n. 5 (9th Cir. 1981) *reversed on other grounds, sub nom. Nevada v. United States*, — U. S. — (No. 81-2245, June 24, 1983); *United States v. Winnebago Tribe of Indians*, 542 F. 2d 1002, 1005 (8th Cir. 1976); *Lac Courte Oreilles Band v. FPC*, 510 F. 2d 198, 210-12 (D. C. Cir. 1975).

While the decision below does not conflict with any decision of this Court, it is consistent with and supported by three other Court of Appeals' decisions, *Lac Courte Oreilles Band v. FPC, supra; Montana Power Company v. FPC*, 445 F. 2d 739, 756 (D. C. Cir. en banc 1970), *cert. denied*, 440 U. S. 1013 (*Montana II*); and *Montana Power Company v. FPC*, 298 F. 2d 335, 338 n. 2, 340 (D. C. Cir. 1962) (*Montana I*). *Lac Courte Oreilles* rejected the Commission's argument, which nevertheless was renewed in this case (Pet. App. 337-38), that the rights and powers of Indian tribes were abrogated by the Federal Power Act to whatever extent the Commission might find necessary in carrying out its licensing authority. *Montana I* and *Montana II* construe FPA Section 10(e), 16 U. S. C. § 803(e), as requiring the approval of the affected Indian tribe in order for a license application involving Indian lands to be approved by the Commission.[11]

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[11]The Section 10(e) argument was raised by the Bands and Interior in this case and was rejected by the Commission. Pet. App. 161-68. It was one of several issues that the Court of Appeals found unnecessary to resolve in light of its FPA Section 4(e) and MIRA Section 8 rulings. *See* Pet. App. 28-29.

Petitioners (Pet. 16 n. 23) and the Amicus Curiae (Br. 14) seek to gain some comfort from Montana Power Company v. FPC, 459 F. 2d 863, 874 (D. C. Cir. 1972), *cert. denied*, 408 U. S. 930 (*Montana III*). But that decision simply held that

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The decision below does not break any new ground and does not conflict with any decisions of this or any other Court.

C. Administrative Construction.

There has not been a long-standing and consistent administrative construction that supports the petitioners' position. To the contrary, the Commission as well as the Secretaries of Interior and Agriculture have recognized the rights, powers, and responsibilities of the Secretaries and Indian tribes over hydroelectric projects involving federal and Indian reservations.

Petitioners principally rely on *Pigeon River Lumber Co.*, 1 FPC 206 (1935). Pet. 10, 11, 16. But that proceeding involved an application for a preliminary permit pursuant to FPA Sections 4(f) and 5, 16 U. S. C. §§ 797(f) and 798, not an application for a license. Hence, the reservation proviso was not yet applicable, and no secretarial conditions had been submitted or imposed. 1 FPC at 209.

The Office of Indian Affairs did contend in the *Pigeon River* proceeding that the preliminary permit "would be made untenable because of the conditions which the Secretary [of the Interior] would feel impelled to include in the license for the protection of the Indians." *Ibid.* The Com-

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neither the Secretary nor the tribes had the power to approve readjustments of annual charges for the use of Indian lands during the term fixed by the license. Contrary to the Commission's view (Pet. App. 163 n. 166), the decision of the three judge panel in *Montana III* did not "supersede" the holding of the en banc Court in *Montana II* that Indian consent is a condition precedent to the issuance of licenses.

mission's opinion did not deal with this potential problem. It simply held that under the first clause of the reservation proviso it is the obligation of the Commission, not the Secretary, to make the finding that the license will not interfere or be inconsistent with the purpose of the reservation. The Commission added that it would give great weight to the judgment and recommendation of the Secretary in making that determination.[12] Since the application for the preliminary permit was denied on other grounds, the Commission never confronted the issue raised in this case. While *Pigeon River* is therefore of no aid to the petitioners, it does evidence the Interior Department's consistent and longstanding position from 1935 to the present that any license issued by the Commission must include the Secretary's conditions.

Arizona Power Authority, 39 FPC 955 (1968), is inconsistent with the petitioners' position. In that proceeding, which involved a proposed project that would utilize Indian lands and waters, the Secretary expressed concern about whether the Tribe's water resources would be adequate to supply the project's requirements without unreasonable detriment. The Commission responded by imposing a condition on the license requiring the licensee to demonstrate that the Tribe was satisfied that the concerns raised by the Secretary had been resolved, 39 FPC at 958,

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[12]The Indian Office also objected to the permit on the grounds that the Indian Tribe could prevent the use of its lands without its consent by virtue of Section 16 of the Indian Reorganization Act, 25 U. S. C. § 476. But the Commission found it unnecessary to resolve that question because the Tribe had not brought itself under the provisions of that Act. 1 FPC at 208-09.

thereby recognizing that the use of tribal waters should not be allowed in the absence of tribal consent.

The legislative history of the 1968 Amendment to the FPA is also instructive. Congress amended FPA Section 15, U. S. C. § 808, by authorizing the Commission to license projects for nonpower use whenever it found that a project should no longer be used for power purposes. During Committee hearings on the bill, the Secretary of Agriculture commented on the effect of the bill on national forests. The Secretary stated his understanding, which was based on discussions between his Department and the Commission Staff, that licenses within national forests would be issued "only with the consent of [the Agriculture] Department and [would be] subject to such conditions" as the Secretary of Agriculture deemed "necessary for the adequate protection and utilization of the [such] lands." H. R. Rep. No. 90-1643, 90th Cong., 2d Sess. 14-15 (1968). Thus, the Department of Agriculture as well as the Commission Staff acknowledged the supremacy of the powers vested in the Secretaries under the reservation proviso as recently as 1968.

This division of responsibility between the Commission and the Secretaries was described by the Report of the expert body established by Congress pursuant to 78 Stat. 982 (1964) to review the administration of federal lands. After quoting the reservation proviso, the Report states:

> [T]he Federal Power Commission is given the ultimate authority to decide whether a project having an impact on a Federal reservation shall be licensed, presumably even over the holding agency's objection . . ., although the Commission must include such conditions

> in the license as the holding agency considers necessary.

Public Land Law Review Commission, *One Third of the Nation's Land* 154 (GPO 1970). This statement is especially noteworthy because representatives of the Commission served as federal members of the Advisory Council established pursuant to the statute. *See* 78 Stat. 982, 983; *One Third of the Nation's Land, supra,* vi, vii.

Thus, at no time prior to its 1975 decision in *Pacific Gas & Electric Co.,* 53 FPC 523, 526, did the Commission ever reject a Secretarial condition imposed pursuant to the reservation proviso.[13] By contrast, the Secretaries of Interior and Agriculture, joined by the Public Land Law Review Commission and even once by the Commission Staff, have long and consistently maintained that the Secretaries' Section 4(e) conditions must be included in Commission licenses. *See* 1 FPC at 209; H. R. Rep. No. 90-1643, *supra,* 14-15; 53 FPC at 524, 526; JA 2652, 2664, 2667-68. And the Commission's 1973 decision in *Northern States Power Company,* 50 FPC 753, was the first and only occasion before this case in which the Commission claimed that the Federal Power Act extinguished preexisting rights of Indian Tribes under applicable treaties and statutes.

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[13]The Secretary of Agriculture and the Justice Department did not appeal the Commission's decision in *Pacific Gas & Electric,* perhaps because Agriculture was not a party to the proceeding, 53 FPC at 524, and, unlike this case, *see supra* at 2-3, Agriculture's conditions were not supported by the record, 53 FPC at 526. It is also worth noting that the Commission's decision in *Pacific Gas & Electric* was issued in February 1975, approximately a month before the Commission's exaggerated view of its own powers was reversed as "plain error" in *Lac Courte Oreilles Band, supra.*

The *Northern States* holding was subsequently reversed as "plain error" in *Lac Courte Oreilles Band v. FPC, supra,* 510 F. 2d at 210-12. Prior administrative practice therefore does not detract from, but rather supports and reinforces, the plain meaning of the reservation proviso.

The decision below is predicated on the plain meaning of the Federal Power Act, is consistent with prior administrative practice and construction and with other lower court decisions, and does not conflict with any decisions of this or any other Court. It does not warrant review, particularly in its current interlocutory posture.

III. The Decision Below Affects Few, If Any, Hydroelectric Projects.

Of the more than 800 hydroelectric projects licensed by the Commission, only a handful are located on Indian lands or adversely affect Indian water rights. In response to a request for a "complete list" of licensed facilities that utilize Indian lands or waters from the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, the Commission identified only eight such projects including Project No. 176. *Hearings on Federal Protection of Indian Resources Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 92d Cong., 1st Sess., pt. 7, at 1677-85 (1972) (hereafter cited as *Hearings*).[14] Of these, two

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[14]Petitioners refer to a statement by the Commission's attorney at the oral argument before the Ninth Circuit that there are 35 licensed projects that utilize Indian lands. Pet. 7 n. 12. The oral statement appears to be at odds with the thoroughly

(Continued on next page)

use Indian lands only for relatively short transmission lines that are directly connected to hydroelectric facilities. *Ibid.* at 1684-85.[15] One of the listed projects, the Montezuma Pumped-Storage Project in Arizona, is the only one other than Project No. 176 which was said to affect Indian water rights. *Ibid.* at 1683. That project has never been built.[16] Thus, at most, the decision below might affect four Indian projects in addition to the one involved in the instant case. As noted *supra* at 14 n. 8, the Tribes of the Warm Springs Reservation expressly consented to the use of their land for one of those projects. The license for that project does not expire until 2001. *Hearings, supra,*

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documented, written analysis signed by the Chairman of the Commission cited in the text.

Part of the discrepancy may be attributable to transmission line licenses issued by the Commission prior to the holding in Pacific Power and Light Co. v. FPC, 184 F. 2d 272 (D. C. Cir. 1950), that the Commission lacks jurisdiction over transmission lines that are not directly connected to hydroelectric facilities. The Commission identified 20 such lines that traverse Indian lands in its response to the Subcommittee on Administrative Practice and Procedure. The licenses for 14 of those projects had expired prior to the July 1982 argument before the Ninth Circuit and 4 more will expire in the next 4 years. *Hearings, supra,* at 1686-89. Since the Commission lacked jurisdiction to issue transmission line licenses, they are not included in our analysis. *See also,* note 15 *infra.*

[15]The use of Indian lands for transmission lines is unlikely to raise the kinds of conflicts between the Commission, tribes and the Secretary that arose in this case. In many, perhaps most, instances, reservations benefit from the transmission lines which provide electricity to their residents.

[16]August 8, 1983 personal communication between the Bands' Counsel of Record and the attorney for the Gila River Pima Maricopa Indian Community.

at 1682. In the case of the Kerr Project on the Flathead Indian Reservation, the Confederated Salish and Kootenai Tribes receive $2,600,000 per year in annual charges for the use of their lands, so it is extremely unlikely that the Tribes would withhold their consent even if they had the power to do so. *Montana Power Company,* 5 FERC ¶61,126 (1978).[17] The Kerr Project is also governed by its own special specific statutes that may qualify or supersede the FPA or otherwise applicable Indian laws. *See* Acts of May 10, 1926 and March 7, 1928, 44 Stat. 453, 465, 45 Stat. 200-212-13, discussed in the Amicus Curiae Brief of Joint Board of Control at 2. And the controversy between the Northern States Power Company and the Tribe concerning Project No. 108 that gave rise to *Lac Courte Oreilles Band v. FPC, supra,* 510 F. 2d 198, appears to be nearing a negotiated settlement. *See Northern States Power Co.,* Commission Order Denying Late-Filed Petitions to Intervene dated May 17, 1983. It is therefore apparent that the Ninth Circuit's decision will have little, if any, impact on other licensed projects that utilize Indian lands or waters.

Even if there were many more licensed projects that utilize Indian lands and waters, the precedential impact of the Ninth Circuit's ruling regarding the relationship between the Federal Power Act and the Mission Indian Relief Act would be limited to the unusual circumstances

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[17]In the typical case involving hydroelectric projects utilizing Indian lands or waters, illustrated by the *Montana Power Company* cases discussed *supra* at 16, the principal issue that arises is the determination of appropriate compensation pursuant to FPA Section 10 (e), 16 U. S. C. § 803 (e). The decision below does not construe Section 10 (e) or affect the manner in which annual charges are calculated.

of this case.[18] As explained *supra* at 8-9, Section 8 of MIRA would apply to the use of the Bands' reservations for the water conveyance facilities included in Project No. 176 even if FPA Section 29 repeals other, pre-1920 Indian statutes as applied to projects whose primary and essential purpose is the development of hydroelectric power. And there are no other hydroelectric projects that utilize lands and waters of Mission Indian Reservations.

The one aspect of the decision below that might possibly have a broader impact is the holding that Commission licenses must include the Secretarial conditions authorized by the reservation proviso.[19] But this provision was enacted as part of the Federal Power Act in 1920 and it has given rise to only two conflicts between the Commission and the respective Secretaries despite the Secretaries' long and consistently maintained position that Com-

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[18]Since the Montezuma Pumped Storage Project was the only other license identified by the Commission that affects Indian water rights and that project was never constructed, see *supra* at 22, the Ninth Circuit's holdings that Indian water rights are encompassed in the FPA's definition of "reservations" and are protected by the reservation proviso will not affect any other existing Indian projects. The reserved water rights of National Forests and other federal reservations are quite limited, see United States v. New Mexico, 438 U. S. 696 (1978), and there is no evidence that the operation of any licensed project conflicts with the water rights that are deemed necessary to fulfill the purposes of any such reservation. Since the Commission is required by the first clause of the reservation proviso to find that the license will not interfere or be inconsistent with the purposes of such reservations, it is unlikely that any such conflicts would have escaped notice.

[19]Assuming its accuracy (which we doubt), the figure of 606 licensed projects that utilize federal lands and reservations, Pet. 7 n. 12, is irrelevant. The power of the Secretaries to impose conditions under Section 4 (e) is limited to reservations. See FPA § 3 (1), 16 U. S. C. § 796 (1).

mission licenses "shall be subject to and contain" their conditions. *Supra* at 17-20. There is no reason to expect the frequency of such conflicts to increase in the future. The Commission and the Secretaries should seek mutually satisfactory solutions no matter who has the final say. *See FPC v. Oregon*, 349 U. S. 435, 449 n. 20 (1955).

The decision below does not prevent the Commission from hearing, considering and evaluating evidence and arguments concerning Secretarial Section 4(e) conditions. It does not preclude consultation between the Commission and the Secretaries, nor does it bar the Commission from pointing out defects in the Secretaries' conditions or from recommending changes in them. And it does not establish or create any unconditional veto powers. It simply holds that when all is said and done, the Commission's licenses shall, in conformity with the directive of the reservation proviso, "be subject to and contain" the Secretaries' conditions.

That holding has two ramifications. It means, first, that the Secretaries' conditions, not the Commission's, are entitled to the presumption of validity for the purpose of appellate court review. Put another way, the role of the appellate court will be to determine whether the Secretaries' conditions, not the Commission's substitutes, are reasonable and are supported by substantial evidence. *See* FPA §§ 4(e), 313(b), 16 U. S. C. §§ 797(e), 825*l*(b) (Court of appeals has jurisdiction to review the Commission's Orders which "shall be subject to and contain" the Secretaries' conditions); Pet. App. 24-25, *modified*, 32-33. *See also*, Pet. App. 40-41 (dissenting opinion). Second, it means that the substantive content of the conditions will

be governed by what is deemed necessary for the adequate protection and utilization of the reservations, not by broad and amorphous concepts of the public interest. *Compare* Pet. App. 143.[20] Both of these consequences of the Court of Appeals' decision are mandated by the express terms of the reservation proviso and are supported by its legislative history, and neither one will frustrate the objectives of the Federal Power Act. *See supra* at 5-6, 10-13.

In the final analysis, the contrary position of the petitioners rests on the entirely unsupported assumption that, notwithstanding the reservation proviso, Congress intended to make the protection and utilization of federal and Indian reservations subservient to the Commission and to the development of water power projects. Congress not only rejected that course when the FPA was enacted in 1920, but has continued to qualify the powers granted to the Commission in order to insure the fulfillment of other important national policies, even during the recent energy crisis. *See* 16 U.S.C. §§ 823a(c), 2705, discussed *supra* at 11-12. Petitioners' argument for a change in that long-standing and consistent policy should be addressed to the Congress. It is particularly out of place in this case in which the production of power is secondary and incidental to the primary purpose of Project No. 176.

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[20]Of course, the Secretaries' powers under Section 4 (e) are limited to insuring the adequate protection and utilization of affected reservations. Subject to the exceptions noted in Part II A *supra*, all other aspects of a hydroelectric project are subject to the broad powers granted to the Commission under FPA Sections 10 (a) and 10 (g), 16 U. S. C. §§ 803 (a), 803 (g).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT S. PELCYGER
Counsel of Record
SCOTT B. MCELROY
FREDERICKS & PELCYGER
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 443-1683

JEANNE S. WHITEING
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Attorneys for La Jolla, Rincon, Pauma, and Pala Bands of Mission Indians

ARTHUR J. GAJARSA
Counsel of Record
WENDER, MURASE & WHITE
One Lafayette Centre
1120 Twentieth Street, N.W.
Washington, D. C. 20036
(202) 452-8950

Attorneys for San Pasqual Band of Mission Indians

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